Societe Jas Hennessy & Co & Anor v Nguang Chan (M) Sdn Bhd

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO D3–22–4010 OF 1998
ZULKEFLI J
21 FEBRUARY 2005

Civil Procedure — Contempt of court — Order of committal, application for — Breach of consent order — Whether defendant had committed contempt by breaching terms of consent order — Rules of the High Court 1980 O 52

Civil Procedure — Preliminary objection — Whether court should rule on preliminary issues — Notice to opponent — Whether notice given to opponent — Whether objections raised mere irregularities — Whether objections raised amounted to a collateral attack on leave granted by High Court for an application for order of committal

The plaintiffs commenced a suit in 1998. The causes of action were infringement of trade mark, passing off, breach of copyright and infringement of registered design in relation to the sale of cognac bearing the Hennessy trade mark by the defendant. The matter was settled prior to full trial and the parties entered into a consent judgment and a consent order was duly recorded. This was an application by the plaintiffs under O 52 of the Rules of the High Court 1980 ('RHC 1980') for a committal order against the defendant for their failure to obey the consent order. The defendant raised procedural objections against the plaintiffs' application.

Held:

(1) The procedural objections raised by the defendant were preliminary in nature. In view of the defendant's failure to give any notice of the same, the defendant was estopped from raising the procedural objections and should be summarily dismissed (see para 5).

(2) The procedural objections raised by the defendant with regard to non-compliance of O 52 of the RHC 1980 were not in any way prejudicial to the defendant as alleged contemnors. Therefore, the non-compliance must be treated as mere irregularities (see para 9).

(3) The objection of non-compliance of O 52 of the RHC 1980 raised by the defendant was an attempt to challenge the leave granted by the High Court, amounting to a collateral attack that should not be allowed. An order of the High Court granting leave must be obeyed and its validity can only be challenged by proceedings instituted for the very purpose and cannot be challenged collaterally in other proceedings (see para 10); *Noble Success Sdn Bhd v Kiyotake Hara & Anor* [1998] MLJU 178 followed.

(4) The plaintiffs have proven beyond reasonable doubt that the defendant had knowledge of the consent order. There was ample evidence in the affidavits, that the defendant had contravened the consent order. The substance of the affidavits filed by the plaintiffs has also not been denied by the defendant (see para 36).

(5) The acts of the defendant which failed to comply with the terms of the consent order in full knowledge of the terms and undertakings set out in the consent order impeded and prejudiced the administration of justice and amounted to an act of contempt of the court and was liable to be punished by an order of committal (see para 33)

[**Bahasa Malaysia summary**

Plaintif-plaintif telah memulakan satu guaman pada tahun 1998. Kausa tindakan adalah untuk perlanggaran tanda niaga, kelirupaan, perlanggaran hak cipta dan perlanggaran rekaan berdaftar berkaitan dengan jualan arak cognac yang menggunakan tanda niaga Hennessy oleh defendan. Perkara tersebut telah diselesaikan sebelum perbicaraan penuh dan pihak-pihak telah memasuki satu penghakiman persetujuan dan satu perintah persetujuan telah pun direkodkan. Ini adalah permohonan oleh plaintif-plaintif di bawah A 52 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') untuk satu perintah komital terhadap defendan kerana kegagalan mereka mematuhi perintah persetujuan tersebut. Defendan telah menimbulkan bantahan-bantahan prosedural terhadap permohonan plaintif-plaintif.

Diputuskan:

(1) Bantahan-bantahan prosedural yang ditimbulkan oleh defendan adalah bersifat awalan. Berdasarkan kegagalan defendan untuk memberikan apa-apa notis berkaitannya, defendan diestopkan daripada menimbulkan bantahan-bantahan prosedural tersebut dan patut ditolak terus (lihat perenggan 5).

(2) Bantahan-bantahan prosedural yang ditimbulkan oleh defendan berkaitan ketidakpatuhan A 52 KMT tidak dalam apa cara pun memprejudiskan defendan seperti yang didakwakan. Oleh itu, ketidakpatuhan tersebut hendaklah dianggap sebagai luar aturan sahaja (lihat perenggan 9).

(3) Bantahan kerana ketidakpatuhan A 52 KMT yang ditimbulkan oleh defendan adalah satu cubaan untuk mencabar kebenaran yang diberikan oleh Mahkamah Tinggi, membentuk satu serangan kolateral yang tidak patut dibenarkan. Satu perintah Mahkamah Tinggi memberikan kebenaran hendaklah dipatuhi dan kesahannya hanya boleh dicabar oleh prosiding yang dimulakan untuk tujuan tersebut dan tidak boleh

dicabar secara kolateral dalam prosiding (lihat perenggan 10); *Noble Success Sdn Bhd v Kiyotake Hara & Anor* [1998] MLJU 178 diikut.

(4) Plaintif-plaintif telah membuktikan melampaui keraguan munasabah bahawa defendan mempunyai pengetahuan berhubung perintah persetujuan itu. Terdapat keterangan yang mencukupi dalam afidavit-afidavit, yang defendan telah melanggar perintah persetujuan itu. Kepentingan afidavit-afidavit yang difailkan oleh plaintif-plaintif juga tidak dinafikan oleh defendan (lihat perenggan 36).

(5) Tindakan defendan yang gagal untuk mematuhi terma-terma perintah persetujuan iaitu dengan pengetahuan penuh tentang terma-terma dan aku janji yang dinyatakan dalam perintah persetujuan tersebut memprejudiskan pentadbiran keadilan dan membentuk satu tindakan menghina mahkamah dan patut dihukum dengan satu perintah komital (lihat perenggan 33).]

Notes

For cases on whether court should rule on preliminary issues, see 2 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 4922–4923.
For cases on application for an order of committal, see 2(3) *Mallal's Digest* (4 th Ed, 2001 Reissue) paras 1500–1512.

Cases referred to

Arthur Lee Meng Kuang v Faber Merlin Malaysia Bhd & Ors [1986] 2 MLJ 193 (refd)
Bramblevale Ltd, Re [1970] Ch 128 (refd)
Bukit Melita Sdn Bhd v Lam Geok Hee & Ors [1996] MLJU 227 (refd)
Cartier International v Lee Hock Lee [1993] 1SLR 616 (refd)
Noble Success Sdn Bhd v Kiyotake Hara & Anor [1998] MLJU 178 (folld)
Spectavest Inc v Aperknit Ltd [1998] FSR 161 (refd)
Wee Choo Keong v MBF Holdings Bhd & Anor and another appeal [1993] 2 MLJ 217 (refd)
*William Jacks & Co (M) Sdn Bhd v Chemquip (M) Sdn Bhd & Ano*r [1994] 3 MLJ 40 (refd)

Legislation referred to

Bar Council Rulings 1997, Part H, para 19(a), (b), (c)
Rules of the High Court 1980 O 52, r 2(2), O 52 r 5(3)

N Nadkarni (WK Chin, Tai Foong Lam and Boey Wei Lyn with him) (Lee Hishammuddin) for the plaintiffs.
Michael Soo (BS Ong with him) (Shook Lin & Bok) and Ringo Low (Ringo Low & Associates) for the defendant.

Zulkefli J:

[1] This is an application by the plaintiffs under O 52 of the Rules of the High Court 1980 ('RHC 1980') for a committal order against the defendant company and its directors for their failure to obey the consent order of this court dated 17 October 2000.

BACKGROUND AND THE CONSENT ORDER

[2] The plaintiffs commenced this suit in 1998. The causes of action were infringement of trade mark, passing off, breach of copyright and infringement of registered design in relation to the sale of cognac bearing the Hennessy trade mark by the defendant. The matter was settled prior to full trial before his lordship Arifin Jaka J and on 17 October 2000 the parties entered into a consent judgment and a consent order was duly recorded before this court, the terms of which are, *inter alia*, summarised below:

(1) That the defendant shall not forthwith affix any labels, shrink wrap, metallic-foil or any other items on the packaging and the bottles except those required by law and the label pursuant to para 3 of the consent order;

(2) That the defendant shall ensure that it is a fundamental term of its purchase, clearly set out in the terms for payment that the laser code at the base of the bottles shall not deface, and that the defendant shall not sell any bottle which have the laser code defaced;

(3) That the defendant shall ensure that all products and bottles bearing the Hennessy trade mark sold by it shall be affixed with a label with the words 'THE IMPORTATION OF THIS PRODUCT IS NOT AUTHORISED BY HENNESSY. THIS PRODUCT IS NOT GUARANTEED BY HENNESSY' which is to be affixed on part of the main label;

(4) That the defendant shall ensure that all stocks presently in its possession and those that it has already purchased amounting to no more than 300 cases are to be disposed of within three months from 1 November 2000; and

(5) That the products specified above and all other future purchases are to bear the label set out in para 3 of the consent order and that the defendant would be given a grace period of 14 days from the date of the consent order to comply with the requirement.

PROCEDURAL OBJECTIONS

[3] Before dealing with the merits of the plaintiffs' application I shall first deal with the procedural objections raised by the learned counsels for the

defendant company and its directors against the plaintiffs' application which can be categorised as follows:

(a) That the affidavit verifying the facts were filed on the same day as the notice of motion and the statements pursuant to O 52 r 2(2) of RHC 1980.

(b) That three affidavits were filed after the notice of motion and statement, and cannot be relied on;

(c) The grounds in support of the contempt proceedings are not stated, or not stated with sufficient particularity in the notice of motion; and

(d) That the statement did not state with sufficient particularity how the directors of the defendant company were responsible, or what they did or did not do, or what they were required to do under the consent order, and that the directors do not have sufficient information to meet the charges.

[4] At the outset, it is my view that the defendant company and its directors as alleged contemnors are barred from raising the above said procedural objections. It is trite law that a party that wishes to take procedural or preliminary objections must give prior notice to the other party. The defendant in this case had failed to do so and thus is estopped from doing so now. Part H, para 19(a), (b) and (c) of the Bar Council Rulings 1997 requires that a written notice be given of intention to raise preliminary objections. The said ruling is set out herein as follows:

(a) An advocate and solicitor shall give written notice, whether by letter, facsimile message or otherwise, to the advocates and solicitors representing all the other parties in the litigation, of his intention to raise a preliminary objection during the hearing of any matter before any court, tribunal of other body authorised to conduct hearings.

(b) Such written notice shall be delivered to the other advocates and solicitors within a reasonable period of time before the hearing but not later than 48 hours before the hearing to enable the said advocates and solicitors to properly prepare themselves and to secure information from their clients with regard to the proposed preliminary objection.

(c) Such written notice shall set out in sufficient detail:

(i) the nature of the proposed preliminary objection;

(ii) a list of authorities that counsel moving the court for the preliminary objections intends to rely on; and

(iii) the proposed relief that counsel moving the court for the preliminary objection will seek before thecourt in the event that the objection is upheld by the court.

[5] It is my finding that the procedural objections raised by the learned counsels for the defendant in their submissions are preliminary in nature and

therefore the above said ruling is applicable. In view of the defendant's failure to give any notice of the same, the defendant company and its directors are estopped from raising the said procedural objections and should be summarily dismissed. (See the case of *Bukit Melita Sdn Bhd v Lam Geok Hee & Ors* [1996] MLJU 227).

[6] Even assuming that the procedural objections merit consideration I still find that the procedural objections raised by the defendant should be dismissed upon consideration of the relevant case laws. In the case of *Arthur Lee Meng Kuang v Faber Merlin Malaysia Bhd & Ors* [1986] 2 MLJ 193 the Supreme Court rules *inter alia* that some of the procedural objections raised in the said case (which is far more serious than objections raised by the defendant in the present case) to be mere technical irregularities and should be dismissed.

[7] The Supreme Court in *Arthur Lee Meng Kwang*'s case also made the distinction between mere irregularities that are not fatal and non-observance of safeguards, which is fatal. In *Arthur Lee Meng Kwang*'s case the objections raised were that:

(i) The motion for committal does not state that it has been issued pursuant to leave granted;

(ii) No statement was before the court when leave was granted;

(iii) The original documents in the *ex-parte* application were not served on the advocate;

(iv) The leave granted had lapsed; and

(v) There were non-observance of Rule 71(3) RSC 1980.

[8] The Supreme Court held that objections (i) and (iii) above are mere technical irregularities and objections (ii), (iv) and (v) were not well founded.

[9] It is my view whether defects in any documents or procedures are non-observance of safeguards or mere irregularities must be dependent on the facts as to whether the alleged contemnor is in any way prejudiced by such defects. I find the procedural objections raised by the defendant as set out in the defendant counsels submission with regard to non-compliance of O 52 of RHC 1980 as not being in any way prejudicial to the defendant and its directors as alleged contemnors. Therefore the said non-compliance must be treated as mere irregularities.

[10] Furthermore, I take the view that the said objection of non-compliance of O 52 of RHC 1980 raised by the defendant and its directors is an attempt to challenge the leave granted by this court, amounting to a collateral attack that should not be allowed. An order of this court granting leave must be obeyed and its validity can only be challenged by proceedings instituted for the very purpose and cannot be challenged collaterally in other proceedings. In support of this proposition I would like to cite the case of

Noble Success Sdn Bhd v Kiyotake Hara & Anor [1998] MLJU 178 wherein it was held inter alia at p 884 as follows:

> From the time the application for leave was made, there was no specific application made to have the grant or leave set aside. Although there was a notice of objection filed, this notice was not itself an application to set aside the grant of leave and could not be treated as such. The respondent having had the time and opportunity to make an application to set aside the leave, clearly had not done so. That leave not having been challenged directly by an application to set it aside, the respondent could not indirectly attack the grant of leave by way of preliminary objection.

[11] In the present case, the defendant had challenged the leave granted by this court for the first time in their counsels submission without any earlier notice. As such the defendant's procedural objection should be dismissed as the defendant must not be allowed to attack the leave granted by this honourable court by way of procedural objection.

[12] It is my finding that the grounds of the contempt by the defendant company and its directors are clearly stated in the notice of motion, and the statement (encl 108) clearly sets out the breaches of the consent order by the defendant company for which the directors are responsible for. The consent order entered into by the defendant company was served personally on all the directors so that all the directors were put on notice of the obligations undertaken by the defendant company in the consent order.

[13] It is noted that the notice of motion (encl 113) at para 1 clearly sets out the grounds of the contempt, in that it states that the directors of the defendant company:

(a) Failed to restrain; and/or

(b) procured, aided and abetted; and/or

(c) authorised the defendant company to breach the clear terms and undertakings of para (1), (2) and (3) of the consent order.

[14] I also find the statement (encl 108) sets out the facts relied upon by the plaintiffs and states that the defendant company has breached the terms of the consent order in that the defendant's Hennessy had a plastic wrap on the bottle in breach of para 1 of the consent order; the label prescribed in para 1 of the consent order were not affixed onto part of the main label in breach of para 3 of the consent order; and the laser code on the bottles has been defaced in breach of para 2 of the consent order.

[15] The statement (encl 108) concludes by setting out the grounds upon which the application for leave is made as follows:

(a) the defendant company has clearly breached and continues to breach the clear and unambiguous terms and undertakings of the consent order; and

(b) the acts of officers (whose names and particulars are set out in para 5) in failing to restrain, and/or procuring, aiding and abetting in and/or authorising the distribution of bottles by the defendant which failed to comply with the terms and undertakings set out in the consent order, impedes and prejudices the administration of justice and amounts to an act of contempt of court.

[16] Order 52 r 5(3) of RHC 1980 specifically provides that no grounds shall be relied on except the grounds set out in the statement under rule 2. Therefore, the statement must be read with the notice of motion for committal. Reading the notice of motion and the statement under rule 2, I find the charges against the directors of the defendant company are clear and unambiguous. In view of the clear and unambiguous charges made against the directors of the defendant company in the notice of motion (encl 113) and the statement (encl 108), the procedural objections made by the defendant has not been made out and must be dismissed.

DECISION OF THE COURT

[17] I shall now deal with the merits of the plaintiffs' application. It is noted that a certified copy of the sealed consent order was served on the defendant's solicitors on 15 November 2000. The consent order were also duly served on all the defendant's directors and manager listed as follows:

(a) Ngan Chen Nguang (NRIC No 491013–10–5653) with a residential address at No 768, 4 1/2 miles Jalan Ipoh, 51200 Kuala Lumpur;

(b) Ngan Chan Hoe (NRIC No 580817–10–5987), with a residential address at No 768, 4 1/2 miles Jalan Ipoh, 51200 Kuala Lumpur;

(c) Ngan Chin Hai (NRIC No 7537101/500722–10–5623), with a residential addres at No 768, 4 1/2 miles Jalan Ipoh, 52100 Kuala Lumpur.

(d) Ngan Meow Yiap (NRIC No 4957128/540509–10–5073), with a residential address at No 768, 4 1/2 miles Jalan Ipoh, 52100 Kuala Lumpur.

(e) Ngan Cheng Lung (NRIC No 5187109/561209–10–5795), with a residential address at No 768, 4 1/2 miles Jalan Ipoh, 52100 Kuala Lumpur.

(f) Ngan Chin Liang (NRIC No 8369185), with a residential address at No 768, 4 1/2 miles Jalan Ipoh, 52100 Kuala Lumpur. ('the said directors')

by way of personal service. (See the affidavits of service affirmed by Shamsul Aznar bin Ahmad on 13 February 2001 and 7 March 2001 and filed in these proceedings on 13 February 2001 and 7 March 2001).

[18] Having studied the affidavits filed on behalf of the plaintiffs and the defendant company and its directors, it is my finding that the plaintiffs have proven beyond reasonable doubt that the defendant company and all its directors had knowledge of the said consent order.

[19] From the evidence and factual circumstances gathered through the affidavits filed by the plaintiffs and the defendant, the plaintiffs have shown that the defendant/Contemnor has clearly breached and continues to breach the clear and unambiguous terms and undertakings set out in the consent order as follows:

(i) On or about December 2000, in the course of monitoring the market, it came to the attention of the second plaintiff that the defendant had not complied with the terms of the said consent order. The second plaintiff then instructed its sales personnel to make purchases of bottles found not to be in compliance with the terms of the consent order distributed by the defendant on or about the first week of December 2000. ('The December 2000 sample'.)

(ii) The December 2000 sample comprised one bottle of Hennessy VSOP cognac and also one bottle of Hennessy VSOP cognac in a special New Year Gift Pack. Upon examination of the December 2000 sample, the second plaintiff found that a clear breach of parAs 1 and 3 of the consent order had occurred in that:

   (a) The label bearing the words 'THE IMPORTATION OF THIS PRODUCT IS NOT AUTHORISED BY HENNESSY. THIS PRODUCT IS NOT GUARANTEED BY HENNESSY' ('the required label') was not placed by the defendant on the main label but at the side of the bottles in clear contravention of para (3) of the consent order; and

   (b) A transparent plastic wrap bearing inter alia the words 'GUARANTEE GENUINE' not being an item on the packaging or bottle required by law had been placed over the bottle by the defendant in contravention of para (1) of the consent order.

(iii) On 15 February 2001 the plaintiffs' solicitors issued a letter to the defendant's solicitors stating that:

   (a) The defendant failed to affix the required label on part of the main label of the Hennessy VSOP bottle;

   (b) The defendant had affixed a plastic wrap onto the Hennessy VSOP bottle not comprising an item required by law to be affixed thereon.

(c) By reason of (a) and (b) above, the plaintiffs were minded to take the position that the defendant had breached the terms of the consent order; and

(d) Requesting the defendant's solicitors to provide an explanation as to why committal proceedings should not be initiated against the defendant, seeking a reply within seven (7) days from the date of the letter was required.

(iv) Solicitors for the defendant replied by way of letter dated 23 March 2001 stating, *inter alia*, that:

(a) The transparent 'plastic wrap' was placed on the bottle in order to prevent adulteration of the defendant's product and that there had been no breach of the consent order;

(b) The label was inadvertently not affixed on the main label of the bottle by the defendant's employees under pressure of time to meet supplies during the festive seasons in spite of the defendant's managing director having directed its employees to stick the label correctly;

(c) The defendant had taken immediate steps to rectify the said oversight immediately upon receipt of the letter from the plaintiffs' solicitors and the defendant collected the products from its customers for re-labelling; to this end a photograph of the product with the label correctly placed was annexed; and

(d) The defendant had no intention whatsoever to do any act which would amount to a breach or non-compliance of the terms of the consent order or to show any disrespect to the court or judge.

(v) It was subsequently discovered by the second plaintiff that the defendant was in fact continuing to distribute the products that contravened the terms of the consent order throughout most of Peninsular Malaysia. Purchases of such products were made by the second plaintiffs sales personnel, proving the defendant's non-compliance of the paras (1), (2) and (3) of the consent order which can be shown by way of illustration for some of the purchase transactions as follows:

Date	Sales Personnel	Place	Breaches	Paragraph In Consent Order

16 February 2001	Woo Soon Ho	Sg Petani Kedah	Label not affixed properly and wrap over bottle	(1) (3)
17 March 2001	Tay Kong Yong	Johor Bahru	Label not affixed properly and plastic wrap over bottle	(1) (3)
22 March 2001	Chak Pooi Man	Bukit Rotan Selangor	Label not affixed properly and plastic wrap over bottle	(1) (3)

Date	Sales Personnel	Place	Breaches	Paragraph In Consent Order
21 February 2001	Yew Ah Lim	Malacca	Label not affixed properly and plastic wrap over bottle	(1) (3)
19 March 2001	Wong Loke Kwee	Ipoh	Label not affixed properly and plastic wrap over bottle	(1) (3)
10 May 2001	Chan Pooi Man	Klang	Label not affixed properly and plastic wrap over bottle	(1) (2) (3)
17 May 2001	Wong Loke Kwee	Sitiawan, Perak	Label not affixed properly and plastic wrap over bottle	(1) (2) (3)

22 May 2001	Yew Ah Lim	Alor Gajah, Malacca	Label not affixed properly and plastic wrap over bottle	(1) (2) (3)
23 May 2001	Tan Kong Yong	Johor Bahru	Label not affixed properly and plastic wrap over bottle	(1) (2) (3)
20 June 2001	Yew Ah Lim	Seg-amat, Johor	Plastic wrap over bottle	(3)

Date	Sales Per-sonnel	Place	Breaches	Paragraphs in Consent Order
25 June 2001	Lim Yong	Ipoh	Plastic wrap over bot-tle	(3)
25 June 2001	Tan Kong Yong	Masai, Johor	Label not affixed properly and plastic wrap over bottle	(1) (3)

[20] Based on the said above purchase transactions, it is my finding that the acts of contempt had taken place after the breach of the said consent order was made known to the defendant and all its directors and manager.

ISSUES RAISED BV THE DEFENDANT

[21] The defendant company and its directors in their defence raised the following issues in their affidavits which are relevant to the present proceedings:

(a) Robert Remnant is not authorised to affirm affidavits on behalf of the plaintiffs because it is hearsay and there is no evidence of purchase, name, address of outlet.

(b) Ngan Chen Nguang, Ngan Chin Hai, Ngan Cheng Lung and Ngan Chin Liang as directors and alleged contemnors are and were not involved in the defendant's business relating to import, distribution and sale of Hennessy cognac, and there is no evidence that they were aware of or understood the terms and effect of the said Order.

(c) The defendant had told the employees to fix a disclaimer label, but it was not affixed due to the pressure of time to meet supplies during the festive period. However, this was rectified immediately after the plaintiffs letter dated 15 February 2001,

(d) The addition of the transparent wrapper does not constitute a breach because the transparent wrapper is not a label, shrink-wrap or metallic foil, and does not fall within the definition of 'affixing'.

(e) The defendants had actually been given three months in order to dispose of the 300 cases of Hennessy from the date of the consent order, being 1 November 2000.

(f) The defendants stated that they had already informed their sales personnel via their sales invoice that the bottles must not be decoded and must have clean labels. There has not been any bottle sold without labels since 23 February 2001.

(g) The defendants further contend that even if there has been a breach, (if any) they have only been isolated instances and only 10 bottles have been sold over six months throughout the country.

(h) The plaintiffs have failed to prove that the defendants have procured, aided, abetted or authorized the contempt.

(i) Justice can be done without the committal.

[22] I shall herein address each issue in turn as follows:

[23] On the issue of Robert Remnant not authorised to affirm affidavits on behalf of the plaintiffs because it is hearsay and there is no evidence of purchase, name and address of outlet, it is my finding that there are ample direct evidence in the form of affidavit of purchase affirmed by the various sales personnel of the second plaintiff exhibiting invoices which show the name and address of the outlets, all filed herein and before this court. Robert Remnant's affidavit set out the background of the present proceedings and how the purchases of the defendant's products were instructed, which he has personal knowledge of. He then merely sets out what the sales personnel bought and reported back. In *Cartier International v Lee Hock Lee* [1993] 1SLR 616. the learned trial judge held that hearsay evidence was acceptable wherein he stated as follows:

In committing a person for contempt of court is a civil proceeding and where the application is ancillary to the main proceedings, it is an interlocutory application and thus hearsay evidence may be included in the affidavits.

[24] Therefore, Robert Remnant's affidavit must be accepted.

[25] On the defendant's contention that Ngan Chen Nguang, Ngan Chin Hai, Ngan Cheng Lung and Ngan Chin Liang as directors of the defendant company are and were not involved in the defendant's business relating to import, distribution and sale of Hennessy cognac and there is no evidence that they were aware of or understood the terms and effect of the said Order, it must be noted that as directors of the defendant company they were at all material times aware of the terms of the consent order as they have been personally served with the consent order. As for the understanding of the terms of the consent order, in *Spectavest Inc v Aperknit Ltd* [1998] FSR 161. it was held *inter ali*a that in order to establish contempt of court it was sufficient to prove that the defendant's conduct was intentional and that he knew of all the facts that made it a breach of the order. It was not necessary to prove that he appreciated it was a breach. I am therefore of the view that the defendant's directors contention that they did not understand the terms is irrelevant, and furthermore, should they not have understood it, clarification should have been sought from the court. The allegation that they were not involved in the business relating to the Hennessy cognac again cannot be a defence. In the case of *William Jacks & Co (M) Sdn Bhd v Chemquip (M) Sdn Bhd & Ano*r [1994] 3 MLJ 40, it was held that directors of a company who had been notified of an injunction, are liable for the breach of an injunction by the company. Therefore, the directors' defence that they left the day to day running of the company to the second defendant and were merely 'sleeping directors' in that case failed.

[26] On the defendant's contention that the defendant had told the employees to fix a disclaimer label, but it was not affixed due to the pressure of time to meet supplies during the festive period and this was rectified immediately after the plaintiffs letter dated 15 February 2001, I find that this contention is not true, as evidenced by the plaintiffs' affidavits (see encls 138, 140, 141, 142, 144 and 150) which set out instances of sales of bottles without the disclaimer label in its proper position as set out in the consent order in and around March 2002.

[27] On the defendant's submission that the addition of the transparent wrapper does not constitute a breach because the transparent wrapper is not a label, shrink-wrap or metallic foil, and does not fall within the definition of 'affixing', I find that the verb 'affixing' comes from the noun 'affix' which is defined in the *Collins Concise Dictionary* (Harper Collins Publishers, 2000 ed) as 'to attach, fasten, join or stick'. The consent order has been translated from the Malay language. The Malay word that used in this context is 'menambah'. It is my view that the addition of the sealed transparent plastic bag does fall

within the definition of 'affixing' or 'menambah' and therefore the defendant had indeed acted in breach of para (1) of the consent order.

[28] On the defendant's contention that the defendant had actually been given three months in order to dispose of the 300 cases of Hennessy from the date of the consent order, being 1 November 2000, I find that the defendant's allegation is again no defence. Even if all the defendant's Hennessy VSOP set out in this application for committal came from the 300 cases, the defence afforded is only in respect of contravention of para 2 of the consent order. Furthermore, it is only the defendant's speculation that the bottles bought by the plaintiffs' personnel could have come from the 300 cases. It is however a fact that bottles contravening the consent order (including contravening para 3 of the consent order) were available in the market as late as July 2002, more than 18 months after the said 300 cases were disposed by the defendant. The defendant must prove its allegation that the bottles bought by the plaintiff 18 months after the disposal were from the 300 cases disposed. The defendant must produce documents showing the sale of those cases to the retailers concerned and also evidence that no other Hennessy cognac were sold and therefore the bottles bought by the plaintiff were in fact from the 300 cases as alleged. This the defendant had failed to do. This court would not entertain the defendant's speculation that the bottles bought by the plaintiff from all over Malaysia for a period of 18 months came from the same 300 cases.

[29] On the issue that the defendant stated that they had already informed their sales personnel via their sales invoice that the bottles must not be decoded and must have clean labels and that there has not been any bottles sold without labels since 23 February 2001, again I find that this fact is untrue, and would refer to the plaintiffs' affidavits in encls 138, 140, 141, 142, 144 and 150, which set out the purchases of such bottles.

[30] On the defendant's contention that even if there has been a breach, (if any) they have only been isolated instances and only 10 bottles have been sold over six months throughout the country, it is my view that as the plaintiffs' purchase of the defendant's bottles were random sample purchase over a long period of more than 18 months, it can be contended that there were a large number of bottles sold over a long period of time that were in contravention of the consent order.

[31] On the defendant's contention that the plaintiffs have failed to prove that the directors of the defendant company have procured, aided, abetted or authorised the contempt, I find that contempt of court has been proven by the plaintiffs, as hereinbefore set out. The fact that there were Hennessy VSOP cognac sold by the defendant that did not comply with the consent order is sufficient proof that the directors of the defendant company is in contempt of court.

[32] On the defendant's contention that justice can be done without the committal, I take the view that committal proceedings are the consequence of breaching a court order, and therefore it is only just that the defendant and its directors be directed to face the requisite penalty as determined by law.

CONTEMPT OF COURT

[33] Any act done, which is calculated to bring a court or judge into contempt or to lower his authority or to interfere with the due course of justice or the lawful process of the courts is a contempt of court. I am of the view that the acts of the directors of the defendant in allowing the defendant to distribute bottles of Hennessy VSOP cognac which failed to comply with the terms of the consent order in full knowledge of the terms and undertakings set out in the consent order impedes and prejudices the administration of justice and amounts to an act of contempt of this honourable court, liable to be punished by an order of committal against the said officers.

[34] It is a civil contempt of court to refuse or neglect to do an act required by a judgment or order of court within the time specified in the judgment or order, or to disobey a judgment or order requiring a person to abstain from doing a specified act. (See 9 *Halsbury's Laws of England* (4th Ed) at para 52). In *Wee Choo Keong v MBF Holdings Bhd & Anor and another appeal* [1993] 2 MLJ 217 his lordship Abdul Hamid Omar LP had this to say on what amounts to an act of contempt:

> It is established law that a person against whom an order of court has been issued is duty bound to obey that order until it is set aside. It is not open for him to decide for himself whether the order was wrongly issued and therefore does not require obedience. His duty is one of obedience until such time as the order may be set aside or varied. Any person who fails to obey an order of court runs the risk of being held in contempt with all its attendant consequences.

[35] The burden of proof in contempt of court proceedings is proof beyond reasonable doubt. In *Re Bramblevale Ltd* [1970] Ch 128 his lordship Lord Denning, *inter alia* stated as follows:

> A contempt of court is an offence of a criminal character. A man may be sent to prison for it. It must be satisfactorily proved. To use the time-hounoured phrase, it must be proved beyond reasonable doubt.

[36] It is my finding in this case that there is ample evidence in the affidavits, including photographs and invoices that prove beyond reasonable doubt that there has been contempt, in that the defendant had sold Hennessy VSOP cognac which contravene the consent order. I further find that the substance of the affidavits filed by the plaintiffs have not been denied by the defendant company and its directors. I therefore find all the six directors of the defendant company as alleged contemnors guilty of contempt of court.

[37] Before passing sentence I took into consideration the plea in mitigation made by the contemnors in particular for their unreserved apology for their alleged unintentional acts of contempt and their plea that custodial sentence should not be imposed on them. Having considered the facts and the circumstances of the case the appropriate sentence to be meted out on the contemnors as directors of the defendant company are as follows:

(1) For the two contemnors Ngan Meow Yiap and Ngan Chan Hoe, I hereby sentence both of them a fine of RM5,000 each and in default of payment a sentence of imprisonment of one month,

(2) For the remaining four contemnors Ngan Chin Hai, Ngan Cheng Lung, Ngan Chen Nguang and Ngan Chin Liang, I hereby sentence them a fine of RM1,000 each and in default of payment a sentence of imprisonment of one week.

[38] In passing a different sentence between the two contemnors and the four other contemnors as stated above, it is my finding that Ngan Meow Yiap and Ngan Chan Hoe appeared to be the active directors of the defendant company whereby they are responsible for the day to day management of the company. On the other hand I find Ngan Chin Hai, Ngan Cheng Lung, Ngan Chen Nguang and Ngan Chin Liang as directors of the defendant company who do not play an active role in the management of the business of the company. I also make an order that the defendant company and all the six contemnors as directors of the company are to pay the costs of this committal proceedings to the plaintiffs.

Order accordingly.

Reported by Peter Ling